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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

BAXTER N. FOUST, Administrator, etc.,

Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMONE N. GAZAN,
Attorney for Petitioner.

INDEX

THE PETITION:

PAGE

STATEMENT OF THE CASE 1

JURISDICTION 8

QUESTIONS PRESENTED 9

OPINIONS BELOW 11

REASONS FOR GRANTING WRIT 11

CONCLUSION 15

THE BRIEF:

ARGUMENTS:

POINTS I, II, III:

Prior to the enactment of Sec. 77B of the Bankruptcy Law, tort claims, and tort judgments obtained after adjudication, were not provable. Such claims were generally allowed to be liquidated by trial in a court of competent jurisdiction and even since the enactment of Sec. 77B, courts have granted the privilege for such tort claims to be liquidated by trial and the refusal of the court below, to modify the restraining order and permit petitioner's tort claim to be liquidated by trial, was erroneous and a denial of due process of law 19, 20, 21

POINT IV:

The mere definition of "creditors" as the holders of claims of "whatever character" and, furthermore, that final decree shall discharge the debtor from all "debts and liabilities", without a more definite expression of intention to include tort claims, is insufficient to justify holding that tort claims are provable and dischargeable under Sec. 77B 22

POINT V: PAGE

Where the Insurance Law of New York gives a tort claimant the right to recover against the insurance carrier when a judgment against the Insured is returned unsatisfied because of the insolvency of the judgment-debtor, the Court had no right to deny a suit to judgment in order that the tort-claimant may obtain the benefits of such insurance law. The refusal of said right to obtain judgment amounted to a denial of due process of law 23

POINT VI:

The Court below should have decided the legal question presented solely on the record, as made, and not upon any extraneous matter which was not a part of the record and which was not considered by the District Court 25

POINT VII:

The Insurance Law of New York, Sec. 109, offers a tort-claimant security for the payment of a judgment within the terms of the policy but a judgment returned unsatisfied, as required, is a condition precedent to subjecting the policy to the lien of the judgment. The Bankruptcy Law requires a secured creditor to first exhaust his security before claiming against the general assets. Security offered by the Insurance Law can only be determined after judgment obtained and where the Court refuses the claimant the right to obtain such judgment, it thereby denies him the right to obtain the security given him by law and prevents him from establishing any amount to constitute a claim against the general assets 26

CONCLUSION 27

PAGE

Anton, 11 F. Supp. 345 21

Crescent Lumber Co., 154 Fed. 724 19
Chi. Title Co. v. Fox Theatres, 69 Fed. (2d) 60 20

Duignan v. United States, 274 U. S. 195 26

Ex Parte Baldwin, 294 U. S. 610 20

Hatch v. Morosco Holding Co., 19 Fed. (2d) 766 20

James Butler Grocery Co., 12 Fed. Supp. 853 .....13, 21

Kronger Bros. Co., 262 Fed. 463 19
Kline v. Burke Const. Co., 260 U. S. 226 20

Langnes v. Green, 282 U. S. 531 20

Missouri Gas & Elec. Serv. Co., 11 F. Supp. 434 21
Munson Steamship Line, 80 Fed. (2d) 859 ..... 5, 8

Ostrom, 185 Fed. 988 19

Reihle v. Margolis, 279 U. S. 224 20

Sawyer v. Am. Ins. Co., 269 N. Y. 143 7
Schall v. Camors, 251 U. S. 239 .....19, 24
Strouse v. Union Indemnity, 57 Fed. (2d) 528 26

Williams v. Bank of America, 55 Fed. (2d) 885 26

STATUTES CITED

Bankruptcy Act, Sec. 77B (c) (10) 13, 15, 19, 21, 22
Bankruptcy Act, Sec. 57 26
Insurance Law of New York, Sec. 109 ..... 2, 24
Title 11, U. S. C. A., Secs. 29-205j-207 ..... 9, 11, 13
Title 46, U. S. C. A., Sec. 688 9

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Statement of the Case

On February 1, 1934, Foust, as Administrator, brought suit against Munson Steamship Line to recover damages for the death by wrongful act of Coy E. Foust while a seaman on the American Steamship "Mundelta".

The action was predicated upon the Jones Act and prayed indemnity for the benefit of the father of the deceased.

The defendant duly answered on February 7, 1934, and the case was at issue awaiting trial.

Four months later, to wit, June 11, 1934, the Munson Steamship Line filed its petition for reorganization under Section 77B; on July 13th, following, it was adjudicated in-

solvent; trustees were appointed and a general restraining order granted, under and by the terms of which the prosecution of all pending actions was enjoined.

The Munson Steamship Line carried liability insurance to protect itself against personal injury and death claims.

Under the laws of New York all liability policies must contain a provision that, in the event of the insolvency or bankruptcy of the insured, upon the return of an execution unsatisfied because of such insolvency or bankruptcy, then the judgment-tort-creditor may bring suit on the policy and recover, within the terms of the policy, the amount of the judgment not exceeding the face of the policy.

> "No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, * * *, and for which loss or damage the person insured is liable, shall be issued or delivered in this state by any corporation or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."
>
> *New York Insurance Law,* Section 109.

Foust was anxious to reduce his claim to judgment by trial in due course so that execution could issue thereon; be returned unsatisfied because of insolvency of judgment-

debtor and, thereupon, to bring suit against the insurance company to recover on the judgment as fully as possible within the terms of the policy.

But he could not proceed with a trial because of the blanket restraining order in the reorganization proceedings and, not desiring to submit his claim for liquidation by a Special Master, filed a motion before Judge ALFRED C. COXE for an order modifying the general restraining order so as to permit Foust to try his pending case in the District Court and obtain a judgment if possible.

Transcript of Record, pages 30-35.

The attention of the court is invited at this time to the fact that there was not a word said in any of the moving papers, or papers in opposition, about there being any deductible clause in the insurance policy whereby, and under the terms of which, the Munson Steamship Line assumed to pay, or became self-insurers, to the extent of the first $2,500.00 of claim, or any other amount.

The terms or provisions of the policy were never mentioned. Judge COXE did not have the policy before him. It was not recited in any of the motions or pleadings. He did not predicate his denial of the motion to modify his restraining order on any provision or recital in the policy. Whether the policy contained any deductible at all was not revealed, and the policy provisions played no part in his refusal to modify the restraining order.

The above facts are important in view of the eventual attitude of the Circuit Court of Appeals.

The modification was refused by Judge COXE and the order stated that a Special Master will be appointed to hear and report if claimant so desires.

Transcript of Record, page 42, folio 125.

The claimant did not want a Special Master. He felt that he had the legal right to a jury trial so he applied

for, and obtained, leave to appeal to the Circuit Court of Appeals but that Court refused to hear argument as to the right to a jury trial and restricted the question it would hear as follows:

> "The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all."
>
> *Transcript of Record*, page 63, folio 189.

The briefs in the Circuit Court of Appeals fully presented arguments and authorities on the question indicated and finally, on January 6, 1936, the Court handed down what was called a "deferring decision". This decision held broadly that the power to restrain covered all kinds of actions; that tort claims were dischargeable in reorganization and, were nothing else before the court, the claim should proceed before a Special Master. But the existence of the liability insurance policy and the provisions of Section 109 of the Insurance Law injected a new element into the case. The court *recognized that a judgment against Munson Steamship Line was a condition precedent to recovery against the insurance company,* and that such judgment must be returned unsatisfied. The court correctly held that an order of the bankruptcy court allowing the Foust claim would not be the equivalent of a judgment, because no execution could issue thereon, therefore, no judgment could be returned unsatisfied and hence the condition precedent to suit against the insurance company could not be met.

The decision then proceeds:

> "It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action the execution would be returned 'unsatisfied' and he then could proceed to collect the *whole claim* from the carrier by direct suit

> pursuant to Section 109. But it is common experience that jurors often return far larger verdicts in negligence actions than reason justifies. The trustees of the debtor have a perfect right to take this into account and not accede to a method for the liquidation of the tort claims that is unusual in bankruptcy unless the ordinary proof before a Special Master would imperil the claimant's rights." (Italics ours.)

It will be noted that throughout the opinion the court said nothing about any deductible clause or any self-insurance by the debtor but, on the contrary assumes—as necessarily it must have at that time—that the policy would have to be *fully paid* by the insurance carrier. The court even conjectures about the possibility of a separate suit by Munson Line against the insurance carrier to recover any dividend which might be paid to Foust from its assets, thus showing that nothing about a deductible clause was before the court, as of course it was not.

The court then made this unusual proposition to Foust:

> "If Foust is willing to stipulate not to use any judgment he may recover in the state action as a claim against the estate there could be no objection to allowing the action to proceed to judgment * * *. But if such stipulation is not filed by the appellant within three days, supplemental briefs shall be filed within ten days thereafter relating to the propriety of the exercise of the judicial discretion of the District Court, whereupon we shall determine whether the stay ought to stand in the absolute form in which it was granted."

For opinion in full see,

In re: *Munson S.S. Line*, 80 Fed. (2d) 859.

Foust then had a problem to solve. He could have his jury trial if he would stipulate not to file any claim based upon his judgment against the debtor's estate, but he had three very good reasons for not so stipulating and he set them forth in his supplemental brief as follows:

1. Foust was granted only limited letters of administration which restricted his authority to the mere prosecution of the action. He had no right to enter into such a stipulation.

2. Under the policy the Munson Line was self-insurer for the first $2,500.00 of any claim and, as the value of the Foust claim would probably not exceed $5,000.00, such stipulation would mean that Foust would have to abandon a substantial part of his claim.

3. Under the terms of the policy the insurer became subrogated to all rights of insured and, if Foust should waive his right to collect *pro tanto* from the debtor, then such waiver might operate to entirely release the insurer.

Here in this supplemental brief was the *first mention* of the $2,500.00 deductible. It was simply stated as a possible reason for not stipulating to file no claim against debtor based on any judgment obtained. It was no part of the record as made. It was not before Judge Coxe. It was not known to the Circuit Court of Appeals when it handed down its "deferring decision".

It was a statement *de hors* the record. It was made because we did know that in another case such a policy which was issued to Munson Line did have that deductible clause, and it was merely assumed that the present policy was similar in its conditions and terms. Neither Foust nor his attorney had ever seen the policy.

As a matter of fact we had always believed that the deductible provision of the policy was void as contrary to Section 109 of the Insurance Law, and we argued that proposition before the New York Court of Appeals last fall.

The "deferring decision" of the Circuit Court of Appeals was handed down on January 6, 1936. It was two days later, to wit, on January 8, 1936, that the Court of Appeals

handed down its decision holding the deductible clause to be valid.

Sawyer v. *Am. Ins. Co.*, 269 N. Y. 148.

It was not until that decision was rendered that we knew that the deductible of $2,500.00 was a claim against Munson Steamship Line, and it was in that knowledge that the deductible was assigned as one of the reasons for not stipulating to waive any claim against the debtor.

We were somewhat surprised, therefore, when the Circuit Court of Appeals seized upon that deductible clause as a justification for the refusal of Judge COXE to modify the restraining order when the existence of such a clause had never been brought to Judge COXE's attention, and no mention was made of it in the opposition papers and affidavits on behalf of the Trustees. Such a reason was not assigned by Judge COXE to justify his refusal to let the tort case proceed to trial and the decision of the Circuit Court has written a fact into the record which was not there when Judge COXE heard and passed upon the *motion*; was not there when leave to appeal was asked; was not there when the briefs were prepared or when the case are argued. It was not there when the court, in its "deferring opinion" on January 6th, 1936, said:

> "Now the condition of liability of the insurance company under the policy will only be fulfilled if a judgment is recovered by the claimant and an execution thereon is returned unsatisfied. It is somewhat doubtful whether an order of the bankruptcy court allowing Foust's claim would be the equivalent of the execution required by section 109 of the Insurance Law, for an execution never issues out of that court, at least in a literal sense. But, even if an order of the bankruptcy court allowing the claim could be said to be the equivalent of an execution, the question would arise whether Foust, after receiving from the Munson Steamship Line whatever dividend might be paid him under the plan

of reorganization, would be able to recover the balance of his claim from the carrier to the extent that such balance, plus what he had received as a dividend, did not exceed the face of the policy. This would depend on whether the words 'returned unsatisfied' in section 109 not only means 'wholly' but also 'partially unsatisfied.' The latter meaning of 'unsatisfied" would subject the carrier to two actions, one by the insured Munson Line to recover the dividend paid and the other by Foust for any balance not in excess of the policy. It may be argued with some, though not altogether convincing, force that such twofold causes of action are not authorized by section 109. It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned 'unsatisfied,' and he then could proceed to collect his whole claim from the carrier by direct suit pursuant to section 109."

In re: Munson S.S. Line, 80 Fed. (2d), at page 861.

The above language is a clear indication that the idea of a deductible clause was not then in the mind of the court.

Nevertheless, when Foust refused to abandon any claim against the debtor as the price for obtaining the right to a trial, which refusal was based upon good and sufficient legal reasons, the Circuit Court of Appeals denied him the permission to try his case in quest of a judgment which was a condition precedent to proceeding against the insurance carrier, and approved and affirmed Judge COXE'S refusal to modify the stay.

Jurisdiction

The decision and judgment of the Circuit Court of Appeals was entered on February 10, 1936.

The jurisdiction of the Court is provided by Section 347 of Title 28 of the United States Code.

An interpretation of Sections 11 and 77B of the Bankruptcy Act (Title 11, U. S. C. A., Secs. 29 and 207), is directly involved.

The Jones Act (Title 46, U. S. C. A., Sec. 688), and the Railroad Reorganization Act (Title 11, U. S. C. A., Sec. 205j), are also presented for construction.

Questions Presented

1

Where a state statute incorporates into every policy of liability insurance delivered in the state, a provision that in the event of the bankruptcy or insolvency of the insured, a judgment-creditor, upon return of the execution unsatisfied because of bankruptcy or insolvency, may recover in a direct suit against the insurance carrier, and the insured defendant seeks reorganization under 77B, and is adjudged to be insolvent, should a general restraining order of the court be modified on application of the tort claimant, whose suit was pending at the time of adjudication, so as to permit the case to be tried, and a judgment obtained, as preliminary to proceeding against the insurance carrier?

2

Assuming that the tort judgment, when obtained, would be dischargeable under ordinary conditions, but with the insurance policy available to the judgment-creditor when execution is returned unsatisfied, as required, did the court have the right, or the discretion, to deny Foust the opportunity to obtain a judgment simply because "jurors often return far larger verdicts in negligence actions than reason justifies," as Judge AUGUSTUS N. HAND phrased his justification, when, under the practice in both state and federal courts in New York, the presiding Judge supervises

verdicts, and may set aside an unreasonable verdict or effect a reduction in any verdict he deems excessive, and otherwise mould verdicts to keep them fair and reasonable?

3

Prior to the enactment of Section 77B tort claims were not provable in bankruptcy, nor were tort judgments, rendered *after* adjudication, provable in bankruptcy. The Corporate Reorganization Act retained the provisions of Section 63 of the Bankruptcy Act as to the provability of claims, but in the new Section 77B defined creditors as "all holders of claims of whatever character" and also provided that final decree shall discharge from all "debts and liabilities." Was it the intention of Congress by such general language to change the pre-existing law, and, by implied rather than by express terms, include tort claims or tort judgments as dischargeable?

4

Where a state statute gives a right of action to a judgment-tort-creditor against an insurance carrier, when certain conditions precedent have been met, and a federal court refuses to modify a restraining order so as to permit those conditions precedent to be complied with, to-wit, by allowing the action to proceed to trial and a judgment obtained, and where the trial of said action would in no way impede, hinder, delay, harass or embarrass the orderly progress of the reorganization, and where the levy of an execution on any of debtor's assets could be controlled by the court, was the effect of such refusal to modify the restraining order to deprive the claimant of a substantial legal right, amounting to a denial of due process of law in contravention of the Fifth Amendment to the Constitution of the United States?

5

Where the action is to recover indemnity for the death of a seaman, under the Jones Act of Congress, and the Jones Act adopts, by reference, the provisions of the Federal Employers' Liability Act, and where the Railroad Reorganization Act (Title 11, U. S. C. A., Sec. 205j), provides that actions for tort arising out of operations shall not be stayed, or if already stayed, the stay to be vacated, do seamen, by virtue of the Jones Act, come within the purview and intendment of said provision?

Opinions Below

The Circuit Court of Appeals wrote two opinions. The first, called the "deferring opinion", was handed down on January 6, 1936, and is reported in 80 Fed. (2d) 859.

The final opinion was handed down February 10, 1936, and as yet not reported.

The District Court (Judge COXE) wrote no opinion but on January 20, 1935, entered this memorandum:

> "The motion is denied with permission to go before a Master and adjudicate the claim if the claimant so desires."

Reasons for Granting the Writ

1

The claimant has been denied the right to obtain a judgment and thereby to enable him to proceed against the insurance carrier to collect under the policy as authorized by the Insurance Law. While the matter of allowing a court trial may be discretionary with the court the discretion is a legal one and not an arbitrary one, and where the orderly administration of the estate will not be affected

by such trial, and even the defense of the action will fall upon the insurance company and not upon the Trustee, to deny such trial simply because the jury may give a more generous award than a Special Master, is not a sufficient ground, and amounts to an abuse of discretion.

2

The Munson Steamship Line protected itself by liability insurance. The Insurance Law of New York wrote into that policy a provision that if a judgment is obtained against the insured, and execution thereon should be returned unsatisfied, because of insolvency or bankruptcy of insured, then the judgment-creditor may recover in direct action against the insurance company.

Neither before Judge COXE in the District Court nor before the Circuit Court of Appeals were the terms or provisions of that policy mentioned or disclosed. Judge COXE decided the motion without knowing whether the policy contained a deductible clause or not. The "deferring opinion" of the Circuit Court of Appeals was not predicated upon any such policy provision.

Furthermore, the court should not have seized upon that extraneous statement about the deductible to justify Judge COXE, when such fact was not even considered by Judge COXE. Indeed it was not known to him. Judge COXE should be sustained or reversed *on the record which moved his decision.*

We contend that to deny Foust the right to a jury trial because of that clause, and thereby prevent him from recovering any amount in excess of that deductible from the insurance company, is a denial of justice.

3

There is an inconsistency between Section 63 of the old Bankruptcy Act and the provisions of Section 77B in respect of the kind and character of claims dischargeable, and

also an inconsistency between the established law that a tort claim may be liquidated by trial before a court of competent jurisdiction, and clause c (10) of 77B, which provides that the Judge "may enjoin or stay the commencement of suits against the debtor until after final decree."

See

In Re: James Butler Grocery Co., 12 Fed. Supp. 851.

The apparent inconsistencies and conflicts should be reconciled, if possible, but failing that, a definite determination should be made as to when and why a claimant may be deprived of his right to a trial.

4

The tort action was brought under the Jones Act to recover damages for the death of a seaman. The Jones Act adopted in favor of seamen the provisions of the Federal Employers' Liability Act, and thereby seamen were placed in the same category as railroad employees.

Under the Railroad Reorganization Act, Title 11, U. S. C. A., 205j, it is expressly provided that suits for damages arising out of the operations shall not be stayed, and any order of stay shall be vacated. There is no similar provision in Section 77B, neither is there any express provision therein about tort claims, but we contend that seamen became beneficiaries of that provision of the Railroad Reorganization Act because they are, in legal contemplation, in the same class as railroad employees. The determination of this question is a good reason for granting the writ.

5

Assuming that the broad language of 77B does include tort claims under "debts, securities other than stock, liens or other interests of whatever character," and are discharge-

able by decree in reorganization, still the method of reducing such claims to a sum certain is quite doubtful. They could be liquidated before a Referee or Special Master. They could be liquidated by permitting pending actions to be prosecuted. If an action is pending, defended by an insurance company, would a court be justified in staying such trial and ordering proof to be made before a Master, at large expense to the debtor's estate for witnesses, stenographic charges and attorneys' fees, when the trial in court of the pending action would impose no expense whatever on the debtor's estate? Would not the supposed saving through a possibly smaller award from a Special Master be off-set by the added expense of trial costs and fees? And would such speculative smaller award be sufficient to deprive a tort claimant, particularly a seaman, of a jury trial?

And if reorganization proceedings could deprive injured employees or injured third parties, of a jury trial, could not corporations resort to reorganization purposely to defeat the very important right of a jury trial in determining disputed questions of fact and in assessing the damages in cases where the claims are many and substantial?

These considerations present a reason for the granting of the writ so that these questions may be answered.

6

The Insurance Law of the State of New York, Section 109, provides that insolvency or bankruptcy of the insured shall not release the insurance carrier from liability under the policy and provides, further, that in case execution against the insured is returned unsatisfied because of insolvency, then a direct action may be maintained against the insurance carrier by the judgment-creditor "under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."

This statute makes it possible, by the mere obtaining of the judgment and having the execution returned unsatisfied as required, for Foust to become a secured creditor to the amount recoverable under the policy.

Under Section 77B a secured creditor's rights are governed by Section 57, clause h, of the Bankruptcy Act, and this section provides that the secured creditor must *first exhaust his security* before claiming against the general estate.

Foust's security is not in marketable stocks or bonds with an easily ascertainable value. His is a contingent security based upon a *cause of action* and a judgment is indispensable to convert that contingency into a vested right, and not only to bring that right into existence, as such, but to fix and determine its value by the assessment of damages.

Foust must first obtain a judgment against Munson Line. Then have the execution thereon returned unsatisfied because of the insolvency of the Munson Line. Then, and not until then, can he sue the insurance company. And not until the insurance company is sued will the amount, provisions and limitations of the policy be revealed.

How can Foust establish or exhaust his security unless he be granted the necessary permission to obtain the prerequisite judgment?

The Circuit Court of Appeals recognized that an award of a Special Master is not the equivalent of a judgment because no execution can issue thereon, yet it denied Foust the right to obtain a judgment! Was this decision proper?

Conclusion

Foust has been denied the very important and valuable right of a jury trial. We concede the power of the court to restrain actions which would create a preference, dissipate assets, or impede, harass or embarrass the court in the orderly administration of the reorganization, but merely

to permit a pending case to be tried in regular course, and a judgment obtained, if possible, in order to qualify the claimant to recover against an insurance company, seems a denial of due process and the abuse of legal discretion.

Juries sometimes are overly generous. The award of Special Masters and Referees are often inadequate. But in this particular case proper regard for economy in handling the debtor's estate would dictate that the suit, already pending and defended by the insurance company, should continue to be defended at the expenses of the insurance company rather than, by reference to a Special Master, have the attorneys for the Trustees defend and charge their fees, plus expenses of the trial, against the debtor.

Prior to the enactment of Section 77B tort claims were regarded as a thing apart from debts. Tort claims were not provable and tort judgments, obtained *after* adjudication were not dischargeable. Section 77B enlarged the old statute by defining a creditor as one having a claim of whatever character and that final decree should discharge the debtor from all "debts and liabilities," language sufficiently broad to include tort claims if considered apart from the generally accepted law, but it seems strange that the Congress, if intending to include tort claims, would not have expressly so stated. The failure to distinctly mention tort claims would leave the word "liabilities" to cover every conceivable civil claim arising from matters *ex contractu* or quasi-contractural, and this view is emphasized by the special provision that if reorganization fails, and liquidation is ordered in bankruptcy, then tort claims may be proved when "evidenced by the judgment of a court of competent jurisdiction." That language presumes a court trial and we cannot conceive that a claimant would be allowed a trial to liquidate a tort claim in bankruptcy and be denied that right in reorganization.

We feel, therefore, that under all the circumstances, this Court should review the findings and make a disposition

more conformable to law and justice, all of which considerations merit the grant of the writ of certiorari.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

Dated, New York, March 24, 1936.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.

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OCTOBER TERM 1935.

BAXTER N. FOUST, as Administrator,
Petitioner,

against

MUNSON STEAMSHIP LINE, Debtor in Reorganization,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

Prior to the enactment of Section 77B tort claims were not provable in bankruptcy, and tort judgments, obtained after adjudication, were not provable.

"Unliquidated claims arising *ex delicto* are not provable in bankruptcy."

Schall v. *Camors,* 251 U. S. 239.

"Judgment based on pure torts are not provable if obtained after the filing of the petition."

Schall v. *Camors,* 251 U. S. 239;
Re: Crescent Lumber Co., 154 Fed. 724;
Re: Ostrom, 185 Fed. 988;
Re: Kronger Bros. Co., 262 Fed. 463.

POINT II

Prior to the enactment of Section 77B courts generally allowed claims to be liquidated before a court of competent jurisdiction.

> "There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which controls the *res*. It is only necessary that in the receivership proof of claim be made in an orderly way so that it may be established who the creditors are and the amounts due them."
>
> *Reihl* v. *Margolis*, 279 U. S., at page 224;
> *Langnes* v. *Green*, 282 U. S. 531;
> *Chi. Title Co.* v. *Fox Theatres*, 69 Fed. (2d) 60(4), (Second Circuit).

If the state court suit merely seeks judgment *in personam* and will not affect the property taken under the federal receivership, the two proceedings may go on concurrently.

> *Hatch* v. *Holding Co.*, 19 Fed. (2d) 766 (Second Circuit). Affirmed *Reihle* v. *Margolis*, 279 U. S. 218;
> *Kline* v. *Burke Const. Co.*, 260 U. S. 226.

And if further citation be needed to establish the principle we cite the recent expression of this court:

> "Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the state court."
>
> *Ex parte Baldwin*, 294 U. S. 610.

POINT III

Even since the enactment of Section 77B courts recognize the right of litigants to have their claims liquidated by regular trial in court, if the orderly administration of the debtor's estate be not interfered with.

"Assuming that the court should direct in some manner the liquidation of unliquidated claims, then there is no reason why the court should not follow the established practice of permitting same to be done in a state court. Particularly is this true where a suit has already been instituted and is now pending."

In Re: Missouri Gas & Electric Service Co., 11 Fed. Supp. 434.

"The claimant who insists upon his constitutional right to a jury trial would do well to reflect that while the court may not be empowered to deprive him of that right, it can control the time for the presentation and allowance of claims and the application of the debtor's property thereto. * * * These considerations yield the view that, while a tort claimant may not be stayed from liquidating his claim in a state court action, expediency will ordinarily divert him from that course."

In Re: James Butler Grocery Co., 12 Fed. Supp. 853.

"Creditor having commenced suit on valid and provable debt before debtor's adjudication in bankruptcy, may prosecute suit to judgment and prove such judgment in bankruptcy proceedings."

In Re: Anton, 11 Fed. Supp. 345 (5), and cases cited.

POINT IV

If Congress had intended to include tort claims among debts and liabilities, thereby to effect a change in the established law and practice, it would have done so in express language.

In Section 77B, (b), (10), Congress undertook to define creditors and claims as used in the Act, and said:

> "The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or his property, including claims under executory contracts, whether or not such claims would otherwise constitute provable claims under this Act."

The language "claims of whatever character" is certainly sweeping and all-embracing and, without more, could be interpreted as including tort claims. But Congress immediately proceeded to limit the broad expansiveness of "claims of whatever character" by a definition of "claims" as follows:

> "The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character."

It is apparent that the *debts* in contemplation were those arising *ex contractu* or from commercial transactions, and the context shows that tort claims were not in the same class or *genera* of "debts, securities * * * or other interests of whatever character."

Furthermore, after including under "creditors" all holders of "claims of whatever character" the Congress deemed it necessary to step beyond this comprehensive generalization by adding *"including claims under executory contracts"* thereby confirming the thought that civil, contractual obligations were intended.

Had the Congress intended to make so radical a change in the extant law as to include the theretofore excluded tort claims, would not the Act have added after "including claims under executory contracts" some positive, emphatic expression like "and tort or other claims arising *ex delicto*?"

And in defining "claims" to include "debts, securities * * *" would not the lawmakers have expressly said something like "debts, *tort or negligence claims for injury or death,* securities, etc.," if there had been the purpose to depart from long established rules and practice and include tort claims?

And in providing for a final decree discharging the debtor from all "debts and liabilities" the word "liabilities" in the context manifestly refers to such as arise from obligations of a civil nature rather than those of tortious origin. Even that one word is not sufficient upon which to predicate an intention to include tort claims without some clear language evidencing such intention. It cannot be done by implication or supposition. Decisions which have been law for many years, and the statute law, cannot be changed or amended or repealed by hint or generalities.

Seems like the Act studiously avoided the mention of tort claims in reorganization for under Clause 6½ of Section 63 of the Bankruptcy Act it was expressly provided that tort claims may be evidenced by "a judgment of a court of competent jurisdiction." Its silence about tort claims in reorganization proceedings while providing for them if reorganization fails and liquidation in bankruptcy ensues, would seem to indicate a resolve to leave the existing law and practice in receiverships unchanged.

> "Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract, express or implied, often require to be liquidated, some provision for procedure evidently was

called for. Clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto*. Such claims might easily have been mentioned if intended to be included."

Schall v. *Camors*, 251 U. S. 251.

POINT V

The Insurance Law of New York creates a right of action in favor of a judgment tort creditor against the liability insurance carrier, if a judgment is recovered against the insured, and execution thereon is returned unsatisfied because of insolvency of insured, to collect the judgment within the terms and to the amount of the policy. To deny tort claimant the right to reduce his claim to judgment as preliminary to making said insurance law available to him, is not only an abuse of discretion but the affirmative denial of due process of law.

Whatever may be the position generally of a mere tort claimant under Section 77B, the New York Insurance Law, Section 109, creates a right of recovery, or security, in his favor, and all he requires is a judgment to make that insurance law available to him. Armed with a judgment, properly returned unsatisfied, he would be relieved from the position of a mere general creditor, if such he be, and given a conditional security, subject to be made absolute by the expedient of such judgment.

This security is a valuable right to the tort claimant, and may be his only possible means of collecting anything on his claim. It is a substantial property right. It is like good collateral. It is a guaranty of payment. The obtaining of the judgment will not impede, hinder or embarrass the orderly progress of the reorganization proceedings, and if judgment is obtained and any effort should be made to levy it on any of debtor's assets, an injunction would prop-

erly issue to stop it. This, however, is most unlikely because the existing restraining order enjoins all sheriffs and marshals from levying any execution or judgment on debtor's assets.

We contend that to deny such tort claimant the privilege and opportunity to obtain the benefit of that insurance law is to deny him due process of law.

POINT VI

The Circuit Court of Appeals should have decided the broad question of right to a trial for liquidating the tort claim solely upon the record as made before the District Court, and not to have decided the question on an extraneous statement made as a possible reason for not waiving a substantial right.

We have hereinbefore shown that the terms of the insurance policy was not a part of the motion papers before Judge COXE. These policy provisions were not before the Circuit Court of Appeals. All that the motion papers or record disclosed to either court was the substantive fact that a liability policy was in force.

In justifying and explaining his refusal to stipulate that he would not file any claim against debtor's estate, based on the judgment, as the sacrifice for obtaining authority to proceed to trial, claimant stated that the policy contained a deductible or self-insurance clause whereby the insurer (debtor) assumed to pay the first $2,500.00 of claim, and that Foust, as Administrator, under limited letters, had no authority to waive so substantial a part of the claim.

We do not think that Foust should have been put in such an embarrassing position, or that he should be penalized by losing his insurance security simply because he refused to enter into a stipulation deemed by him to be beyond his authority. He sought the legal right to subject

that policy to the lien of his claim, and we submit that this legal question, raised on the record, should have been decided on the record and on its merits, divested of such foreign considerations as deductible clauses and the possibility that a jury might award an excessive amount. The court under its rules had no right to decide a question not passed upon by the court below.

Williams v. *Bank of America,* 55 Fed. (2d) 885 (12);

Strouse v. *Union Indemnity,* 67 Fed. (2d) 528 (8).

See

Duignan v. *United States,* 274 U. S. 195.

POINT VII

By the Insurance Law of New York, Section 109, Foust could become a secured creditor by first obtaining a judgment against debtor, and the Court erred in refusing him the right to proceed to trial.

The liability insurance policy is a potential security for Foust's claim. The New York Insurance Law is applicable law. The policy was issued and is in full force and effect. The insured has been adjudicated insolvent and such insolvency will justify and support a Marshal's return of unsatisfied because of insolvency. All that Foust needs to make that policy subject to his claim is a judgment. With that, and the execution issued thereon returned unsatisfied as required, and immediately he becomes a creditor holding security.

Under the Bankruptcy Act before a secured creditor can claim anything against general assets he must first apply the security to the liquidation of his claim.

Section 57, Bankruptcy Act, subdivisions e and h.

Foust's security is the insurance policy. What amount he can realize on that can only be determined by suit on

the policy when its terms, conditions and amount will be revealed. If there is a deductible the amount of it will then appear, and if the judgment should exceed the deductible, then the amount payable by the insurance carrier will be known as well as the balance which will form a claim against the debtor's estate.

The Circuit Court of Appeals committed error in denying Foust the privilege of proceeding against the policy to have the value of his security established and to have the amount for which the debtor's estate will be liable fixed and determined.

A suit to judgment is the only method by which the policy could be subjected to the payment of the Foust claim, in whole or in part. That's the only way he could exhaust his security as preliminary to claiming against the debtor.

Conclusion

We have presented several questions which arise out of the peculiar situation which developed in this case. We have named several reasons why the writ of certiorari should be granted. In the Brief we have stressed the outstanding legal propositions which we think justify the favorable consideration of this Court.

Altogether, we think the record presents such gross errors of law, such a denial of justice and such needed interpretations of the Corporate Reorganization Act, and pertinent allied statutes applicable to seamen, as to merit the grant of the writ herein prayed for.

Respectfully submitted,

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